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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

GEORGE BOLDMAN,
District Attorney, Tioga County,
Attorney for Appellee,
27-29 Lake Street,
Owego, New York.

ELIOT H. LUMBARD,
Chief Counsel,

ARNOLD M. WEISS,
Assistant Counsel,

NEW YORK STATE COMMISSION OF INVESTIGATION,

Of Counsel.

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of the New York Supreme Court, on January 8, 19[illegible] (1345-1350).*

On October 24, 1958, sitting without a jury, the Tioga County Court, *Clabessy, J.*, entered a judgment of conviction against petitioner (109-118); trial had been held in Tioga County on September 30th and October 1st, 2nd and 3rd, 1958. The original judgment sentenced petitioner to sixty days in jail on each of seventeen separate counts of criminal contempt, all terms to run concurrently, and fined him $250.00 on each count for a total fine of $4,250.00 (116-117). While affirming petitioner's conviction, the Court of Appeals held his contemptuous conduct during his appearance before the Grand Jury constituted but one single contempt and therefore directed that petitioner be resentenced and a new judgment of conviction entered (Jurisdictional Statement, Appendix A, p. 3a). The County Court subsequently resentenced petitioner for the one crime of criminal contempt to sixty days imprisonment and a fine of $250.00 (Jur. State., App. F). It is from this new judgment, entered on July 12, 1960, that petitioner has both petitioned this Court for a writ of certiorari and simultaneously attempted to perfect an appeal as of right (See also No. 415, October Term, 1960).

On July 8, 1960, the Court of Appeals denied petitioner's motion for re-argument, 8 N.Y. 2d 1011 (1960); it also amended the remittitur, 8 N.Y. 2d 1008 (1960), as requested by petitioner, so as to specifically state the federal questions considered by that Court (See Jur. State., App. B and C).

* Numerals in parentheses refer to folio numbers in the record on appeal to the Court of Appeals.

Pertinent documents omitted from the record on appeal are attached to this brief as an Appendix.

The New York State Commission of Investigation assisted the District Attorney of Tioga County in the preparation of this brief pursuant to his request under the provisions of Section 2(4), Chapter 989 of the New York Laws of 1958; Section 7052(4), McKinney's Unconsolidated Laws of New York, which reads:

> "Upon request of district attorneys and other law enforcement officers, the commission shall cooperate with, advise and assist them in the performance of their official powers and duties."

The Opinions Below

The opinion of Judge Fuld on behalf of the Court of Appeals is reported at 7 N.Y. 2d 371, 200 N.Y.S. 2d 43 (1960), and the opinion of Mr. Justice Coon on behalf of the Appellate Division, Third Department, is reported at 9 A.D. 2d 181, 495 N.Y.S. 2d 558 (1959) (1366-1389). The opinion of the Tioga County Court, *Clohessy, J.*, is reported at 14 Misc. 2d 213, 178 N.Y.S. 2d 873 (1958) (1288-1337). Each of these opinions is set out in petitioner's Jurisdictional Statement, Appendices A, D, and E, respectively.

The Constitutional Provision and Statutes Involved

The only constitutional provision cited by petitioner is the Fourteenth Amendment to the United States Constitution.

The pertinent statutory provisions not quoted in this motion are set forth in petitioner's Jurisdictional Statement, Appendix H.

The Facts

On November 14, 1957, the New York State Police reported stopping and questioning at the premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who resided in various sections of this country and abroad. Petitioner, a claimed resident of New Jersey, was among this group (394-395).

The circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location on a Thursday in November—indicated extensive planning and unity of purpose. The meeting attracted extraordinary attention. The Grand Jury of Tioga County, *the location of this event*, initiated an investigation shortly thereafter to determine whether any crimes had been planned or committed in connection with that meeting (389-391, 403).

The Grand Jury was particularly concerned with possible violation of the laws against criminal conspiracies, bribery of public officials, and monopoly and restraint of trade (12, 389-391, 409, 493).

Accordingly, pursuant to Section 618-a of the Code of Criminal Procedure, the New York enactment of the Uniform Reciprocal Witness Act, a certificate was obtained from the Tioga County Court stating petitioner was a "material and necessary" witness

the Grand Jury's investigation (Appendix to this brief, p. 4a). A hearing thereafter was held in the Essex County Superior Court of New Jersey, where petitioner apparently resided, and the usual form of subpoena-order subsequently issued directing petitioner's appearance before the Tioga County Grand Jury (Appendix to this brief p. 1a). After issuance of this subpoena petitioner chose to appear voluntarily before the Grand Jury (130-141).

Upon appearance on February 25, 1958, petitioner exercised his privilege against self-incrimination as to seventeen questions directed to him by the Grand Jury concerning the meeting at Barbara's (214-222). The Grand Jury then voted to confer and did confer immunity upon petitioner at the request of the District Attorney (222-226). Petitioner was informed immunity was conferred under the authority of Section 2447 of the Penal Law, and further told the meaning and scope of that conferral; he was clearly warned that failure to respond after immunity was conferred might result in contempt proceedings such as this very case (227-230).

The first question to petitioner was then repeated and again he refused to answer (230). The Foreman of the Grand Jury, upon request of the District Attorney, then directed petitioner to answer the question (231). Petitioner continued to refuse to answer that question and the following sixteen questions, although directed to do so as to every question (231-254). In each instance his refusal took the form of claiming his privilege against self-incrimination even

though immunity had been conferred upon him (231-254).

Counsel to petitioner accompanied him to Tioga County for this appearance and was available outside the grand jury room during his direct refusals to respond to any questions concerning the Apalachin meeting (228-230).

The Grand Jury then indicted petitioner under Section 600(6) of the Penal Law for criminal contempt (10-82). The seventeen counts in the indictment represented refusal of petitioner to answer each of the seventeen questions put to him before the Grand Jury on February 25, 1958 (10-82).

As noted, a judgment of conviction was entered on October 24, 1958 after trial without a jury (109-118).

ARGUMENT

POINT I

Petitioner was accorded full due process protection during this proceeding.

Various allegations have been made by petitioner that his conviction is "repugnant" to the due process clause of the Fourteenth Amendment to the United States Constitution. These allegations basically relate to three separate areas, although not so stated in the Petition (see Petition: Questions Presented For Review pp. 2-3; Timely Raising of Federal Questions pp. 5-9; Reasons For Granting the Writ pp. 9-18). Each is discussed below, although the basic answer to

each is essentially the same: the allegations are without merit and, in any event, concern matters of state criminal procedure, approved by the highest state court that by no analysis are so extreme in their consequences as to warrant action by this Court.

A. Petitioners conduct before the Grand Jury constituted criminal contempt under New York law.

Petitioner contends that a conviction for contempt of a New York grand jury must include the element of failure to comply with a direction of a New York of the Fourteenth Amendment to the United States Constitution.

Petitioner's misconception arises from a failure to recognize that contempts are of many varieties. Contempt is not limited to contempt of court, but may be committed against other bodies or officers. Contemptuous behavior before such other body, be it a legislative committee, a referee in bankruptcy or a grand jury (as here) may be made a crime. An additional disobedience to a court, which is what the extra element of a court direction would require, is not necessary in New York. And, indeed, federal law contains examples of statutes providing for contempt other than of a court, *e. g.*, Title 11, United States Code, Section 69 (contempt of a referee in bankruptcy).

Cases cited by petitioner fail to establish that contempt of a body other than a court requires the additional direction by a court to answer; some did not include a court direction to comply. Nevertheless,

in each case the conviction was upheld by this Court. *Emspak* v. *United States*, 349 U.S. 190 (1955) (contempt of Congressional Committee); *Quinn* v. *United States*, 349 U.S. 155 (1955) (contempt of Congressional Committee); *accord*, *Commission* v. *Lombardozzi*, 5 N.Y. 2d 1026 (1959), *appeals dismissed sub nom. Castellano* v. *Commission*, 361 U.S. 7 (1959) and *Mancuso* v. *Commission*, 361 U.S. 10 (1959); and *cert. denied sub nom. Piccobono* (*Miranda* and *Castellano*) v. *Commission*, 360 U.S. 930 (1959) (defiance of New York State Commission of Investigation by others at the Apalachin meeting).

Authorities referred to by petitioner do establish, however, that the body before whom the contempt is committed, whatever body it be, must direct the witness to answer. *Emspak* v. *United States*, *supra*; *Quinn* v. *United States*, *supra*. The purpose of the direction is to make clear to the witness what particular testimony is demanded of him by his interrogator. Without such a direction, the element of criminal intent may not be established beyond a reasonable doubt. This petitioner was directed by the Grand Jury to answer each and every one of the seventeen questions. Accordingly, there is no doubt of the Grand Jury's demand for his testimony, nor of the petitioner's criminal intent. Moreover, the Court of Appeals finally held petitioner's entire appearance constituted one criminal contempt so specific directions as to each question might not *now* be required in New York so long as the witness' general course of contemptuous conduct is clear.

Petitioner's reliance on *Brown* v. *United States*, 359 U. S. 41 (1959) is ill-founded. *Brown* involved procedural questions regarding federal grand juries, a different statute and thus a completely different issue

The statute involved in *Brown* was a federal contempt statute which specifically included as an element of grand jury contempt defiance of a court direction. Section 600 (6) of the Penal Law, as interpreted by the Court of Appeals below, does not require a court direction as an element of a grand jury contempt.

The issue in *Brown* also was completely different. It involved the due process requirements of notice and opportunity to defend. Specifically, the question in *Brown* was whether, after a contempt is complete, a United States District Court may recall the contemnor, have him repeat his defiance before the Court, and thereby commit a second contempt. This second contempt, committed in the presence of the Court, allows the Court to impose a summary sentence and thereby deprive contemnor of notice and hearing protections he would have been accorded had he not been recalled by the District Court. This Court held the recalling of the witness and the resultant summary contempt commitment were proper.

The due process questions of notice and opportunity to be heard are not in issue in this case. Moreover, the most casual perusal of the record below will show petitioner was given a full scale criminal trial with adequate notice and opportunity to defend and that he fully availed himself of these basic rights. The trial accorded him all recognized standards of procedural due process.

B. The trial court properly rejected petitioner's offer to prove irrelevant facts.

Petitioner asserts the County Court erroneously refused to hear his proof that the Grand Jury was acting without authority, as the Grand Jury did not establish it was investigating a specific crime.

Decisions in the New York courts and in this Court firmly recognize a grand jury's authority to investigate suspicious circumstances to determine whether a crime has been committed. A prior showing that a specific crime definitely was committed has never been and could not be a prerequisite to the institution of a grand jury investigation. *Blair* v. *United States*, 250 U.S. 273, 282 (1919); *Hendrix* v. *United States*, 323 U.S. 178 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 65 (1905); *People* v. *Stern*, 3 N.Y. 2d 658 (1958).

The County Court below found the Grand Jury was impaneled and conducted with meticulous compliance with New York statutory provisions (1304-1337, Opinion of CLOHESSY, *J.*). In addition, the meeting on a Thursday morning in a remote hamlet in central New York State of sixty-two men with notorious records in organized criminal activity, their flight from the State Police, their extraordinary explanations to the Police, and other facts, certainly provided sufficient ground for the Grand Jury investigation.

Accordingly, the Court's rejection of petitioner's offer to prove no specific crime subsequently was charged or established by the Grand Jury was in full accordance with law. Surely petitioner cannot appeal to argue a grand jury inquiry is illegal simply because

no substantive indictments were filed and his contemptuous conduct must thereby be "forgiven".

Furthermore, this alleged error or any similar allegation of bad faith on the part of the Grand Jury is in no sense a federal issue for this Court.

* * * * *

Similarly, petitioner's offer to prove that immunity granted in New York would not protect him from prosecution in New Jersey, or that the danger of such prosecution was real or imminent, was properly rejected. As demonstrated in Point II, *infra*, proof of such a nature is irrelevant since protection from prosecution under the laws of the sovereign which grants immunity is all that it may confer.

C. By his voluntary appearance before the Grand Jury, petitioner waived any challenge to the propriety of his presence before that body; and Section 618-a of the New York Code of Criminal Procedure was used properly to bring appellant before the Grand Jury.

The County Court found, on the basis of the record (130-141), that petitioner appeared voluntarily before the Grand Jury. He did so after the Superior Court of New Jersey, Essex County, found as a matter of fact that petitioner was a material and necessary witness in the Tioga County, New York, grand jury proceedings and thereby ordered him to appear. Accordingly petitioner has waived any challenge of unconstitutionality to Section 618-a of the Code of Criminal Procedure.

But assuming, *arguendo*, that petitioner's attendance before the Grand Jury was not voluntary, his challenges against Section 618-a nevertheless are without merit.

Section 618-a of the Code of Criminal Procedure is New York's codification of reciprocal legislation enacted in at least forty-three States to provide for securing the testimony of out-of-state witnesses at criminal proceedings, including grand jury inquiries. This reciprocal legislation is commonly referred to as the Uniform Reciprocal Witness Act. The Florida codification of this Act, and virtually identical to the New York Act, was sustained as constitutional by this Court in *New York* v. *O'Neill*, 359 U.S. 1 (1959).

The provisions of this Act defining persons subject to its command are clear. In Sub-section 1 the term "witness" is defined to include "a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding". Sub-sections 2 and 3 state the only limitations on this broad definition of "witness". They require that the witness be "material" and "necessary".

With no basis in precedent or reason, petitioner seeks to avoid command of the statute by engrafting an unfounded restriction onto the statutory definition of "witness". Out of whole cloth, he creates a new conception—"potential defendant". Without explanation or definition of the term, he contends that he is such a person and, therefore, cannot be subjected to the Act, *even though he was given immunity from prosecution and so can never be an actual defendant.*

"Potential defendant" is nowhere defined by petitioner and appears to be based entirely on a routine statement of the District Attorney in the Grand Jury room, advising him of his rights to assert his privilege against self-incrimination during the Grand Jury pro-

ceeding. The statement of the District Attorney is as follows:

> "Now should you feel at any time, any answer you may make may tend to incriminate you, or subject you to prosecution for a crime, you have a right to assert your constitutional privilege against self-incrimination by saying: 'I refuse to answer on the ground that my answer may tend to incriminate me.'
>
> "It is quite conceivable, in the course of this investigation, you may turn out to be a defendant, although we are calling you as a witness in this investigation. It is for you to assert your privilege against self-incrimination. It is for you to say at any time when an answer you may give may tend to incriminate you, that it does tend to incriminate you." (211-213)

These harmless but quite appropriate statements of the District Attorney made solely to advise petitioner of his rights against self-incrimination are now made to appear monstrous and the basis for alleging a violation of the Fourteenth Amendment.

The sincerity of petitioner's position is cast in doubt when in one part of his argument he considers himself a potential defendant and in the next moment challenges the Grand Jury's authority to investigate him since they failed to establish the commission of a crime.

Not only is there no merit to this completely specious argument but such a warning by the District Attorney should be encouraged and not used as a ground for claims of improper conduct.

POINT II

Petitioner was fully immunized against state prosecution and his testimony could be commanded by the Grand Jury under pain of contempt.

This Court consistently has rejected efforts in any form to superimpose the privilege against compulsory self-incrimination on states or state proceedings. It has ruled repeatedly that the Fifth Amendment to the United States Constitution is not available to prevent state coercion of testimony from witnesses fully immunized against state prosecution. In addition it has consistently ruled that neither the due process clause nor the privileges and immunities clause of the Fourteenth Amendment incorporates the Fifth Amendment privilege against compulsory self-incrimination so as to make that privilege available during state proceedings. *Mills* v. *Louisiana*, 360 U.S. 230 (1959); *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Adamson* v. *California*, 332 U.S. 46 (1947); *Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Jack* v. *Kansas*, 199 U.S. 372 (1905); *accord*, *Commission* v. *Lombardozzi*, 5 N.Y. 2d 1026 (1959), *appeals dismissed sub nom. Castellano* v. *Commission*, 361 U.S. 7 (1959) and *Mancuso* v. *Commission*, 361 U.S. 10 (1959); and *cert. denied sub nom. Riccobono (Miranda and Castellano)* v. *Commission*, 360 U.S. 930 (1959); *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

Petitioner brings nothing new to this forum. His contention is nothing more than an attempted evisceration of the holdings in *Mills* v. *Louisiana*, 360 U.S. 230 (1959), and other cases recently decided in this

court. And it is significant that nowhere in the course of his argument on immunity does petitioner even mention *Mills*. There are no "unique factors" in his case which make those decisions inapplicable, as an examination of his arguments quickly reveals:

1. Petitioner contends that the Commission of Investigation, to whom the grand jury minutes were made available, is required by statute to cooperate with federal authorities, and that the resultant increased exposure to federal prosecution renders his immunity ineffectual.[1] This precise argument was raised in this Court by four defiant witnesses testifying before the Commission of Investigation. Provisions of the very same statute, Section 7052 (5), McKinney's Unconsolidated Laws, were cited. The Court made preliminary disposition of each of these cases, dismissing two on appeal, *Castellano* v. *Commission of Investigation*, 361 U.S. 7 (1959); *Manuso* v. *Commission of Investigation*, 361 U.S. 10 (1959), and refusing to grant certiorari for the others, *Riccobono, Mercado and Castellano*, 360 U.S. 930 (1959).[2] Actually, the Commission was not in existence at the time, having commenced office on May 1, 1958.

2. Petitioner also contends the danger of prosecution in foreign states is real and imminent. This Court's decision in *Mills* v. *Louisiana*, 360 U.S. 230 (1959), must end any lingering speculation by petitioner that either imminence of foreign prosecution or federal-state cooperation will make the federal privilege against self-incrimination applicable to state proceedings.

The facts in *Mills* were stipulated. The cooperation to be admitted was significant and an accomplished

fact. It did not consist of merely a statutory duty or authority to cooperate, which is the most petitioner may demonstrate here. Furthermore, the danger of federal prosecution in *Mills* was imminent. Indictments against persons implicated had already been returned. A grand scale federal investigation by the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service, was in full swing. And as Mr. Chief Justice Warren noted in his dissenting opinion: "Doubt which might have existed concerning federal interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years" 360 U.S. at 234.

This Court held neither of these factors converted the Fifth Amendment directly, or through the vehicle of the Fourteenth Amendment, into a prohibition against the states or state action in enforcement of its fundamental police powers through conferring immunity.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

GERALD BOLEMAN,
District Attorney, Tioga County,
Attorney for Appellee,
27-29 Lake Street,
Owego, New York.

ELIOT H. LUMBARD,
Chief Counsel,

ARNOLD M. WEISS,
Assistant Counsel,

NEW YORK STATE COMMISSION OF
INVESTIGATION,
Of Counsel.